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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1267

MANUEL VACA, CALEB MOONEY, and
ERNEST F. KOBETT,
Petitioners,

vs.

NILES SIPES, Administrator of the Estate of
Benjamin Owens, Jr., Deceased.

MOTION OF SWIFT & COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Swift and Company respectfully moves the court for leave to file the attached brief, as *amicus curiae,* in support of the above captioned Petition for Writ of Certiorari to the Supreme Court of Missouri, as provided in Rule 42 of the Rules of this Court.

The consent of the attorneys for the petitioners herein has been obtained but the attorney for the respondent herein has refused to consent to the filing of such a brief by Swift & Company.

While Movant is interested in the pre-emption question presented by petitioners' Petition for Certiorari, Movant does not desire to take a position thereon or to brief it in this case. However, because of the impact of the question of fair representation upon the continued existence of a sound grievance procedure with the concomitant rights of a Company to rely on the authority of the bargaining representative in the grievance procedure and of Union representatives to exercise their judgment in the handling of a grievance, Swift & Company should be entitled to file a brief in support of the Petition for Certiorari. The interest and concern of Movant in this question is set forth and demonstrated in the attached brief.

WHEREFORE, Swift & Company prays the court for leave to file the attached Amicus Curiae Brief in Support of the Petition for Certiorari herein.

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AMICUS CURIAE BRIEF OF SWIFT & COMPANY IN SUPPORT OF PETITION FOR CERTIORARI

The Amicus Curiae Brief of Swift & Company is submitted subject to favorable action on the motion for leave to file to which it is attached, counsel for the respondent having refused consent that it be filed.

INTEREST OF AMICUS CURIAE

Swift & Company is engaged in business throughout the United States and employs approximately 45,000 persons in its United States plants and facilities. Of this total number of employees, approximately 32,000 are hourly-paid employees. Of this latter group, approximately 82.5% are in a bargaining unit for which various Unions are the collective bargaining representatives.

The petitioners involved in the case presented here were sued as representatives of and as a class representing the National Brotherhood of Packinghouse Workers* (hereinafter referred to as the "NBPW") and its Local No. 12 (hereinafter referred to as "Local No. 12"). The NBPW and its Local No. 12 are the collective bargaining agent for approximately 1,360 employees in a bargaining unit at Movant's Kansas City, Kansas, Meat Packing Plant. In addition, the NBPW (and one of its several local unions) represent employees of Movant in bargaining units at seven other Swift & Company meat packing plants located in the United States. At these plants, such Union is the collective bargaining agent for a total of approximately 5,600 employees.

At still other meat packing plants of Swift & Company in the United States, approximately 12,400 employees are in bargaining units represented by either the Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO) or the United Packinghouse, Food and Allied Workers (AFL-CIO). In units and facilities of Swift & Company other than meat packing plants, there are approximately 8,400 employees in about 317 separate bargaining units which are represented by Unions. In sum total, Swift & Company is signator to more than 300 collective bargaining agreements with the various Unions that represent the aforementioned employees.

For Swift & Company, as for other employers whose employees are represented by Unions, it is essential that the collective bargaining relationship between the Company and the Unions representing its employees be a workable system. Of vital importance in such a system

*Now known as the National Brotherhood of Packinghouse & Dairy Workers.

is the existence of an orderly method by which grievances are to be processed and handled through the grievance procedure, including the right of the grievant's Union representatives to settle or withdraw a particular grievance claim at some point in the grievance procedure without processing it further when such Union representatives determine that the facts of that particular grievance warrant such disposition.

It is the opinion of Movant that the decision of the Supreme Court of Missouri, particularly as it relates to the standards of fair representation of an employee by his Union through the grievance procedure, seriously undermines the orderly administration of the grievance procedure in every collective bargaining agreement. Thus, it serves to undermine the entire collective bargaining relationship. The decision of the Supreme Court of Missouri in effect holds that if there is any evidence in a given case that would permit a jury to determine that a grievant had a meritorious claim, then the Union representing him may be found guilty of unfair representation in not carrying the matter through all steps of the grievance procedure and into arbitration. In effect, a jury is asked to pass upon whether or not the grievant's claim did indeed have merit after a Union in its honest judgment and with its thorough knowledge of the particular industrial scene determined that that particular grievance lacked sufficient merit to warrant further processing.

Thus faced with the possibility of defending a damage suit, with all of its expenses and uncertainties, brought by every unhappy grievant whose claim was not processed through the entire grievance procedure, a Union would undoubtedly choose to press a large number of grievances through the entire procedure—including ar-

bitration—regardless of whether the grievance was meritorious or not. The cost of this in time and money to Unions, employees and employers would be tremendous. Worse still, it would result in the complete breakdown of an orderly, workable grievance procedure which is of such vital importance to the collective bargaining process. The destruction of a sound grievance procedure would ultimately hurt the employees, the Unions and the employers. Furthermore, such undermining of the authority and responsibility of the bargaining agent with respect to the administration of the collective agreement immediately could raise a question of a Union's authority in the collective bargaining process itself. It seems to necessarily follow that if every grievant dissatisfied with his Union's handling of his grievance can take his case to court, then an employee dissatisfied with any part or all of a contract negotiated by his Union could be entitled to do likewise.

Suit has also been filed on behalf of Mr. Benjamin Owens against Swift & Company claiming $10,000.00 damages on account of the Company's failure to return Mr. Owens to work in January, 1960. The case was not brought to trial prior to Mr. Owens' death on December 8, 1964, it has not been revived and, under Movant's interpretation of the law of Missouri, the right of revival has been lost. If his administrator prevails in the present case, Movant would have an additional defense. Nevertheless, despite its seeming advantage in seeing Owens' administrator prevail in the case now before this court, the chaos created by his so doing causes such great concern to Movant that it must support the petitioners in their Petition for Certiorari.

ARGUMENT

It should be self-evident that the rights of an individual employee must be respected in the collective bargaining process and in the administration of the collective bargaining agreement and that the employee is entitled to fair representation by the Union representing him. At the same time, the entire thrust of the national labor policy is the establishment and preservation of a collective bargaining system where the rights of the individual must necessarily be related to those of the group. The group, or its Union representative cannot discriminate against the individual or practice fraud or deceit as to him but so long as it in good faith fairly represents him he should be bound by its actions.

It is submitted that the decision of the Supreme Court of Missouri in the instant case has gone far beyond the establishment of a reasonable standard of fair representation and would allow every individual grievant who is dissatisfied with a decision of the group or its representative or who thinks that it may have been erroneous in its judgment in handling his particular grievance to have that decision or judgment reviewed by a court or jury. To let such a rule stand would be disastrous to the collective bargaining system and the administration of the grievance procedure in a collective bargaining agreement.

Perhaps if the NBPW had taken the Benjamin Owens case to arbitration it would have prevailed and he would have gotten his job back. Swift & Company does not think so. It denied the grievance through the first four steps of the grievance procedure based upon the very substantial evidence it had in the form of Doctors' reports that Owens had severe heart damage, hypertension and was a very sick man whose health did not allow him to work. The

soundness of this judgment is borne out by the fact that Mr. Owens died on December 8, 1964, from a "cardio vascular accident due to hypertension," the very thing feared if he was returned to work.

That an arbitrator might have found for Owens is immaterial. The statement of the Missouri Supreme Court (397 S.W.2d l.c. 665) that "we have concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff" (followed by a summary of medical evidence in his favor) is just as immaterial. It establishes a completely unworkable standard for the resolution of disputes under collective bargaining agreements.

Every grievant must feel that he has some basis for his complaint. Understandably, employees who lose their jobs or are disciplined, demoted, transferred to an undesirable job, laid off or who do not realize promotion see only their particular problem. It is only human nature for any grievant to have more or less of a feeling of dissatisfaction if his complaint is not resolved completely in his favor but it is equally true that not all grievances are, or should be, taken to arbitration. For example, at Swift & Company's meat packing plants for the period 1959 through 1965, Company records show that approximately 1,661 cases were taken by the Unions into the fourth step of the grievance procedure. (The Union taking the case into the fourth step would be either the National Brotherhood of Packinghouse Workers, the Amalgamated Meat Cutters and Butcher Workmen of North America (AFL-CIO) or the United Packinghouse Food and Allied Workers (AFL-CIO) depending on which Union had the bargaining rights at the particular meat packing plant involved.) Of this total number of 1,661 cases entering the fourth

step, Company records show that 1,247 grievances were disposed of by some form of settlement, including withdrawal by the Union in some cases, 377 grievances were "held open" and are still in that status today and only 37 cases were taken to arbitration by the Unions. If each of the grievants whose case had been settled by a Union in the fourth step (or earlier) in a manner which displeased the grievant, or had been withdrawn by the Union in the fourth step (or earlier) or whose case still is being "held open" in the fourth step were entitled to complain "of the refusal of the Union to fully process his grievance," the results would be devastating.

If the standard of fair representation established by the Missouri Supreme Court is permitted to stand, the only way a Union can protect itself from the expense and hazards of a lawsuit by an unhappy grievant would be for it to take the case through arbitration and even then, if the grievant is still not satisfied, attempt to attack the arbitration award. In the meantime all sorts of problems pile up with respect to the remedy, often involving employees (other than the grievant) whose positions or rights may have been changed since the grievance. It is axiomatic that early and prompt disposition of grievances is essential to the orderly administration of a labor agreement and any effort to maintain industrial peace through a grievance and arbitration procedure.

The Supreme Court of Missouri, after disposing of the pre-emption questions, points out (397 S.W.2d l.c. 665) that one of the defendants' alternative contentions was:

> "* * * that under the facts and evidence adduced plaintiff has failed to show that the defendant Union was guilty of bad faith or discriminatory motive in refusing to further handle or process plaintiff's grievance *since there was not adequate medical evidence to show that plaintiff had a meritorious claim.*" (Emphasis supplied)

It is submitted that the issue should be one of whether or not the Union acted in a discriminatory manner, was guilty of fraud, dishonesty or deceit or even possibly negligence; basically a question of good faith. It should not be one of whether or not the Union erred in its evaluation of the merits of the grievance.

As pointed out by Mr. Justice White in *Humphrey* v. *Moore*, 375 U.S. 335, 349 (1964):

> "* * * we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. * * * Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes."

Just as in *Humphrey*, in the instant case "As far as this record shows, the Union took its position honestly, in good faith and without hostility or arbitrary discrimination."

Where a Union, as in Owens' case, has made a reasonable investigation of the circumstances and arrived at an honest judgment concerning the likelihood of success in pressing the grievance to arbitration, there should be no "second-guessing" by a court or jury. This should be true even though the Union's judgment might be one with which a court or jury would disagree. An analysis of the collective bargaining relationship and the need to maintain its integrity and recognition of the fact that there is no absolutely right answer to the myriad of issues that arise in the administration of a collective bargaining agreement can lead to no other conclusion.

In *Black-Clawson Co., Inc.* v. *International Assn. of Machinists*, 313 F.2d 179 (1962), the court had under con-

sideration the individual right of an employee, as distinguished from the right of his Union, to compel an employer to arbitrate his discharge grievance. In holding that he did not, the court in an opinion by Judge Kaufman, stated:

> "Our conclusion is dictated not merely by the terms of the collective bargaining agreement and by the language, structure, and history of section 9(a), but also by what we consider to be a sound view of labor-management relations. The union represents the employees for the purposes of negotiating and enforcing the terms of the collective bargaining agreement. This is the modern means of bringing about industrial peace and channeling the resolution of intra-plant disputes. *Chaos would result if every disenchanted employee, every disturbed employee,* and every employee who harbored a dislike for his employer, *could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration* in the face of clear contractual provisions intended to channel the enforcement remedy through the union. 'A union's right to screen grievances and to press only those it concludes should be pressed is a valuable right * * *,' Ostrofsky v. United Steelworkers, 171 F. Supp. at 790, and inures to the benefit of all of the employees." (Emphasis supplied) (l.c. 186)

Chaos will also result if every dissatisfied grievant is permitted to test the good faith judgment of his Union in a suit for damages claiming unfair representation without alleging and proving discrimination, fraud, deceit, dishonesty or negligence.

This Court has emphasized the value of the grievance and arbitration procedure as a major factor in achieving industrial peace, its stabilizing influence and that the federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of awards. *United Steelworkers* v. *American Mfg. Co.*, 363

U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960); and *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). This concern for the grievance and arbitration process will go for naught if the decision of the Missouri Supreme Court as it relates to the standard of fair representation is permitted to stand. The use of grievance and arbitration procedures will become so cumbersome, time-consuming, expensive and fraught with such uncertainties and perils that it will fail to serve its purpose in the industrial complex.

CONCLUSION

By denial of the Petition for Certiorari in this case, this Court will in effect place its stamp of approval on a standard of fair representation established by the Supreme Court of Missouri which seriously undermines the existence of a workable grievance procedure so necessary to the collective bargaining relationship. The grievance procedure will become so meaningless and such chaos will result that its continued effectiveness will be destroyed. The Petition should be granted.

Respectfully submitted,

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